SUPREME COURT OF THE UNITED STATES.

F. E. KEHRER,
Plaintiff in Error,
vs.
A. P. STEWART,
Defendant in Error.

No. 152.
October Term, 1904.
In Error to the Supreme Court of the State of Georgia.

STATEMENT OF THE CASE.

This case comes up under writ of error to the Supreme Court of Georgia on final judgment upholding the constitutionality of the Tax Act of 1900 as applied to the plaintiff in error. The act in question so far as applicable to the present case is as follows:

GENERAL TAX ACT FOR 1901-1902.

No. 175.

"An act to levy a tax for the support of the State government and the public institutions; for educational purposes in instructing children in the elementary branches of an English education only; to pay the interest on the public debt; and to pay maimed Confederate soldiers and the widows of Confederate soldiers such amounts as are allowed them by law for each of the fiscal years 1901 and 1902; to prescribe what persons, professions and property are liable to taxation; to prescribe the methods of collecting and receiving said taxes; to prescribe the methods of ascertaining the property of the State subject to taxation; to prescribe additional questions to be propounded to taxpayers, and to provide penalties and forfeitures for non-payment of taxes; to prescribe how the oath of taxpayers shall be administered, and provide penalties for violation thereof, and for other purposes."

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"Sec. 2. Be it further enacted by authority aforesaid, That in

addition to the *ad valorem* tax on real estate and personal property, as required by the Constitution and provided for in the preceding section, the following specific taxes shall be levied and collected for each of said fiscal years."

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"Nineteenth. Upon all agents of packing-houses doing business in this State, two hundred dollars in each county where said business is carried on."

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"Sec. 3. Be it further enacted by the authority aforesaid, That the taxes provided for in paragraphs 1 and 2 of section 2 of this act shall be returned to the tax-receiver in the county of the residence of the person liable to such tax, and shall by the receiver of tax returns be entered upon his digest of taxable property, and that the taxes provided for in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, *19*, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of section 2 of this act shall be returned and paid to the tax collectors of the counties where such vocations are carried on."

"Sec. 4.—Be it further enacted by the authority aforesaid, that the taxes provided for in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, *19*, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of section 2 of this act shall be paid in full for the fiscal years for which they were levied to the tax-collectors of the counties where such vocations are carried on at the time of commencing to do business specified in said paragraphs. Before any person taxed by paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, *19*, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 of section 2 of this act shall be authorized to carry on said business they shall go before the ordinary of the county in which they propose to do business and register their names, places of business, and at the same time pay their taxes to the tax-collector; and it shall be the duty of said ordinary to immediately notify the Comptroller-General and the tax-collector. Any person failing to register with the ordinary,

or having registered, failing to pay the tax as herein required, shall be liable to indictment for misdemeanor, and on conviction, shall be fined not less than double the tax or be imprisoned as prescribed by section 1039 of Volume III of the Code of 1895, or both, in the discretion of the Court. One half of said fine shall be applied to the payment of the tax, and the other to the fund of fines and forfeitures for use of officers of Court."

The case originated in the city court of Atlanta by plaintiff in error bringing suit to recover the amount of tax exacted of him under said law. The original declaration in this suit raised a Federal question by alleging the act to be in violation of the 14th Amendment to the Constitution of the United States. Record pp. 19 (38) and 20 (39).

Defendant interposed a general demurrer which was overruled and this judgment was reversed on writ of error from the Supreme Court of Georgia. Record, p. 28 (56).

In this decision the act was construed to apply only to managing-agents of packing-houses, and only one such agent at each place of business, and that the tax was imposed upon the agent and not upon the business of his employer. Record, p. 23 (45).

Under this construction of the act plaintiff in error on the second trial amended his original declaration and raised the additional Federal questions that as construed and enforced the act (a) violated the 14th Amendment, paragraph 1 of the Constitution of the United States, and (b) violated the 10th section and 1st paragraph of Article 1 of the Constitution of the United States prohibiting laws impairing the obligations of contracts, and (c) violated the commerce clause of the Constitution of the United States, clause 3, section 8, article 1. General demurrer was interposed to the declaration as amended, and sustained, and this judgment was affirmed by the Supreme Court of Georgia. (See Record pp. 43-50.)

In the second opinion of the Supreme Court of Georgia the act is held in effect to be a tax upon the business of the employer and

that "it is unconstitutional only to the extent that it seeks to tax interstate commerce. To that extent it is invalid, and the plaintiff in error would not have been subject to the tax at all had he confined himself to interstate business."

SPECIFICATION OF ERRORS RELIED ON.

First.—The Court erred in holding that the specific tax upon all agents of packing-houses doing business in this State, levied and collected of plaintiff in error under the provisions of paragraph 19 of section 2 of the General Tax Act of Georgia, approved December 21, 1900, and the provisions of section four of said act, requiring plaintiff in error to register his name and place of business (Acts of Georgia Legislature 1900, p. 21), are not violative of paragraph 1 of article 14 of the amendments of the Constitution of the United States, known as the fourteenth amendment of said Constitution, for that the State of Georgia by and through said provisions of said act seeks

(a) To deprive plaintiff in error of his liberty and property under an arbitrary and unlawful classification, without due process of law.

(b) To abridge the privileges and immunities of plaintiff in error, as a citizen of the United States.

(c) To deny to plaintiff in error the equal protection of the laws.

Second.—The second assignment of error will not be insisted upon.

Third.—The court erred in holding that by the provisions of said paragraph and section of said act which require plaintiff in error to register and become liable to said specific tax by reason of his being agent for Nelson Morris & Company, the greater part of whose business is interstate commerce in the conduct of which the services of plaintiff in error are necessary, there is no unlawful tax upon or interference with or regulation of interstate commerce in violation of clause 3, section 8, article 1 of the Constitution of the United States, for that

(a) A tax on the privilege of selling goods is in effect a tax on the goods themselves.

(b) One who, in this State, as agent of a principal residing in another State, takes orders on such principal for the purchase of goods

held in such other State, and who, when the goods are shipped by his principal to him, receives them in this State, and delivers them in the original packages to the customers from whom he obtained the orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce.

(c) Interstate commerce can not be taxed, regulated or interfered with in any manner or to any extent by the laws of any State.

(d) A law of a State which taxes, regulates, or interferes with a business as a whole, while said business is partly interstate and partly domestic, must be so framed and enforced as to operate alone upon that part of said business which is domestic, in default of which the entire law is void as being repugnant to the Constitution of the United States providing that Congress has exclusive power to regulate commerce among the several States.

(e) Said paragraph and section of said act of the Legislature of Georgia, by their terms and necessary operation, impose a tax and a regulation upon the entire business of Nelson Morris & Company, including that part of the business of Nelson Morris & Company which is interstate commerce. This is alleged to be the greater part of said business and the demurrer admits the truth of the allegation.

Fourth.—The court erred in holding that one who is subject to a specific occupation tax by reason of his conducting, for another, a domestic business within this State, is not rendered exempt from such tax because he also conducts for the same principal other business which is not subject to State taxation, for that such a tax upon such an occupation can not be segregated, and must rest upon the sales of goods made both in domestic and interstate commerce, and hence amounts to a tax upon and regulation of the latter in violation of said provisions of the Constitution of the United States.

Fifth.—The court erred in affirming the judgment of the said city court of Atlanta sustaining said demurrer and in not reversing said judgment and sending said case back for further proceedings in accordance therewith.

ARGUMENT.

Clear discussion of this case requires at the outset a succinct exposition of the case law of Georgia on what constituted interstate commerce at the time this suit was brought and the changes therein before its final determination, with an analysis of the two opinions of the Supreme Court of Georgia in the record.

This suit was filed April 6, 1901. Record, p. 22.

In Racine Iron Co. *vs.* McCommons, 111 Ga. 536, decided August 7, 1900, the Supreme Court of Georgia announced its decision that agents of principals residing in other States who made "executory contracts for the sale of goods, and who, when the same are shipped into this State, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers with whom such contracts have been made," are not engaged in interstate commerce within the meaning of the Federal Constitution. With this recent case, then before counsel, the Federal question, that the act under discussion burdened and interfered with interstate commerce, was not then raised by the pleadings. The case at bar was originally brought and tried below, as appears in the record, on the grounds that plaintiff in error was not conducting any business of his own; that the classification in the act was unreasonable and arbitrary; and that the act as applied to plaintiff in error violated the fourteenth amendment. These questions were decided adversely to plaintiff in error in the first opinion of the Supreme Court of Georgia, handed down April 3, 1902, and found in the record, page 23. In this opinion the act under discussion is construed to declare "that an agent representing a packing-house and carrying on its business in any county in this State is pursuing a vocation or occupation, and is *himself* doing business in this State, and is liable to the tax." Further construing the act the Supreme Court of Georgia says that "the word 'agents,' as used in this paragraph of the act, means managing or superintending agents, and

includes every agent who is the *alter ego* of the principal by whom he is employed." Record, page 23; 1st and 2d headnotes.

The foundation of this decision rests on the proposition that the agent is *himself* conducting a business of his own, *individually* and *personally*, separate and apart from the business of his employer.

Following the trend of the decisions of this Honorable Court, when Stockard *vs.* Morgan, 185 U. S. 27, was decided April 7, 1902, it foreshadowed the coming of Caldwell *vs.* North Carolina, 187 U. S. 622, with sufficient clearness to justify counsel in raising the interstate commerce question as plead in the amendment filed June 21, 1902, and found in the record, pp. 37-42. The question thus raised is decided in the second opinion in the record, (pages 43 to 50), which was delivered on May 30, 1903. In the meantime Caldwell *vs.* North Carolina, 187 U. S., 622, was decided Jan. 12, 1903, resulting in a reversal by the Supreme Court of Georgia of its former decisions on the line of Racine Iron Co. *vs.* McCommons (111 Ga. 536), and the announcement of the law, in conformity with the decision of this Honorable Court, as reported in Stone *vs.* State, 117 Ga. 292, decided March 13, 1903.

In the *Stone* case the Court says: "One who, in this state, as representative of a principal residing in another State, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods are shipped by his principal to him, receives them in this state, breaks the original packages in which they are contained, distributes them among the customers from whom he obtained such orders and upon delivery receives from them the price of the goods, is engaged in interstate commerce."

The doctrine of the *Stone* case is given full effect in the second opinion in the case at bar, the foregoing quotation therefrom being embodied in the opinion in the record, page 47, followed by this language: "Under these rulings, by which we are bound, that part of Nelson Morris & Company's business which consisted in shipping goods to Atlanta to fill orders previously received, the goods being

delivered in accordance with such orders, was interstate commerce. It was, therefore, not subject to taxation or interference by the State, and an act seeking to impose any tax upon such a business would be unconstitutional and void. The occupation of the plaintiff in error as agent for the conduct of this part of the business is so closely and directly connected therewith that, in so far as the act seeks to tax him as such agent, the act is void." Record, page 47. In the same division of the opinion it is held that "a tax or charge for a license to sell goods is, in effect, a tax on the goods themselves."

It is important to observe and keep clearly in mind, that the learned Court in its second opinion expressly reaffirms its judgment in the first opinion and holds the same to be *res judicatæ* of all questions therein raised and decided. See Record, p. 45. The first decision construes the act; the second applies it. It is respectfully insisted that the application of the act as thus construed is erroneous, in that it was not declared wholly void, instead of partially void. This error, we submit, resulted from the Court, in its second opinion, failing to keep in mind the meaning and purpose of the act as defined in its first opinion. As construed in the first opinion, it was the purpose of the act "to tax only one agent in each county, representing or conducting the business of a packing-house, and as only one, the managing or head agent, (was) in charge of the business, (he) was the one intended." Record, p. 27 (63).

It is further held that this managing-agent, or *alter ego,* was so classified and subjected to the tax because, through him, the "packing-house conducts its entire business in a given locality," and "to hold otherwise would be to attribute to the General Assembly (of Georgia) the utterly unreasonable purpose of imposing a specific tax of two hundred dollars upon every employee of a packing-house doing business in Georgia, without regard to the extent of his authority or the amount of his compensation." Record, p. 27 (53).

Reading into the act the meaning thus given it, it imposes a tax

"Upon all managing or head agents of packing-houses in charge of the business of such packing-houses to the extent of one such agent for each packing-house in each county in the State of Georgia representing or conducting the entire business of such packing-house therein."

In applying the act in the second opinion the learned Court holds that the effect of the tax falls on the packing-house, because it is imposed on their instrumentality for the sale of goods, to wit: their *alter ego* agent; and, as to that part of their business, conceded to be interstate, the occupation of plaintiff in error, as agent, is so closely and directly connected therewith the act is void in so far as it seeks to tax him as such agent. This attempt to split the occupation of plaintiff in error, in applying the act, does not place a construction on it different from that announced in the first opinion. That construction stands. Under that construction, however, the application of the act to two kinds of business is impossible, because the first opinion expressly holds that it was the purpose of the act "to tax only one agent;" and the one agent so taxed was to be the manager or *alter ego* of the employer; he was the one intended, because he conducted for the packing-house *"its entire business;"* his classification for the purpose of such taxation was reasonable, because he did conduct the *entire* business, and to hold otherwise would be to attribute to the General Assembly of Georgia an "utterly unreasonable purpose."

From what has been said it appears that in the first opinion the act is construed to be levied upon plaintiff in error, individually and personally; and in the second opinion it is applied as though it had been imposed directly upon the business of his employer and is upheld only because a portion of such business is found to be domestic and not interstate.

Our argument will proceed on two general lines: the act violates, first, the fourteenth amendment and, second, the commerce clause of the Constitution of the United States.

I.

THE ACT VIOLATES THE FOURTEENTH AMENDMENT.

Plaintiff in error most respectfully insists that this act is obnoxious to the fourteenth amendment of the Constitution of the United States, which, under the construction of the Supreme Court of the United States, guarantees to plaintiff in error and all other citizens of the United States "the liberty of pursuit—the right to follow any of the ordinary callings of life."

Butchers' Union Co. *vs.* Crescent City Co., 111 U. S. 746.

"The 'liberty' mentioned in that amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by his incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose *to enter into all contracts* which may be proper, *necessary and essential* to his carrying out to a successful conclusion the purposes above mentioned."

Allegeyer *vs.* Louisiana, 165 U. S. 578.

(a) The decision says: "It does seem somewhat anomalous to speak of the business of one, who, as agent, is really not conducting business of his own, but the business of some one else, but it was within the power of the Legislature to declare that one doing this very thing was himself carrying on business, and we think that is exactly what the General Assembly has done in this instance." Record, p. 25. In conforming to the provisions of the act as applied to this "anomalous" business one who proposed to engage in it, *before* he would be authorized to pursue it, must go before the ordinary of the county in which he proposes to do the business, register his name, his place of business, and *at the same time* pay his tax. Bear in mind that his business is to be that "of one who, as agent, *is really not conducting business of his own*, but the business of some one

else," and it necessarily follows that "some one else" will have to be consulted and propitiated before he will allow the "subject of this tax" to conduct said business; that is to say, the person out of employment must be employed before he has a business, and yet he must register before he can do business, lawfully, even the anomalous business indicated; and pay $200 tax for the privilege of pursuing a "vocation or occupation" at a specified place in a specified county.

The anomalous business, which under this decision the Legislature has classified for taxation, can not be engaged in without the procurement of the employment designated as a business. This employment involves a contract between employer and employee,—in the case at bar, weekly employment, subject to discharge without notice. A "business" of even this weak and brief a tenure can not be lawfully engaged in, which is to say such a contract of employment can not be lawfully complied with until the proposed employee has first registered and paid his tax. None of the other employees at this "place of business" are so hampered; they are free to live and work where they will; to earn their livelihood and contract for that purpose *ad libitum* so long as they avoid the appellation of "Chief Clerk and Manager."

(b) The singling out of the chief clerk and manager from among all the employees of Nelson Morris & Company in the city of Atlanta, Ga., and arbitrarily creating a separate and distinct class of chief clerks and managers of packing-houses doing business in this State, and declaring that such clerks and managers are pursuing a vocation and occupation and are themselves doing business in this State, and requiring the payment of a tax and the registration of such business as a condition precedent to the privilege of carrying it on, is a mere juggling with words by the Legislature, and does not in any manner change the real nature of the business of such men or their true relation to their principals or employers. The levying of this tax and the requirement as to this registration in

respect of the chief clerk and manager (who, according to the allegations of the declaration is no more nor no less than an employee of Nelson Morris & Company, as are the other clerks and employees of said firm), has the necessary effect of putting burdens upon the chief clerk which are not imposed upon others in like situation, and thereby deprives him of the equal protection of the law and of his property and his liberty without due process of law in violation of the fourteenth amendment of the Federal Constitution.

The declaration alleges in paragraph six that at this Atlanta house there are eleven other employees; that is, your petitioner, the bookkeeper, the assistant bookkeeper, the stenographer (who also acts as a billing clerk), the shipping clerk, two city salesmen, the man in charge of the cooler where meats are preserved until sold (called the cooler man), two drivers, and a laborer, who boxes, wraps or crates goods sold for shipment. The wages and salaries of each of the above-stated employees are paid by the week, and each and all of said employees, including your petitioner, are employed by Nelson Morris & Company, the exclusive owners of said business.

The demurrer admits the truth of this allegation. This act singles out plaintiff in error, arbitrarily assumes that he is the *alter ego* of his employers, thrusts upon him an occupation and a business consisting of drawing his weekly salary in consideration of devoting his time to his employers' business, compels him to register or become a criminal, imposes a heavy and unreasonable tax of $200 a year, or fraction thereof, for the so-called privilege of working for his wages, and imposes no such restraints, nor any restraints of any kind, upon his coemployees in the same business, at the same place, under the same circumstances, and with the same interest or lack of interest in the firm by which they are in common employed.

This plaintiff in error lived and worked as the employee and chief clerk and manager of Nelson Morris & Company without let or hindrance prior to the passage of this act. He was earning his liveli-

hood by this lawful employment, and for that purpose he had entered into a contract for a weekly stipend with Nelson Morris & Company, in consideration of which he devoted his time and energies to their business. Every other clerk and employee there was doing exactly the same thing. Since this act the chief clerk and manager is deprived of these rights and privileges unless he pays this extraordinary and unreasonable tax, and subjects himself to criminal prosecution in default of payment and registration, as required by this act, and yet the other employees are permitted to go on in the same way as before without any burdens or restrictions whatever. We most respectfully submit that this is a denial to the plaintiff in error of the equal protection of the laws, as guaranteed to him by the fourteenth amendment of the Federal Constitution.

(c) But take a broader view of the situation. Packing-houses are not the only institutions that require chief clerks and managers, or other employees, on weekly wages, or who are required to conduct their business through an agent which may be termed the *alter ego* of his principal. It is impossible to say that the general manager of a packing-house employed on a weekly salary, from a *personal* and *individual* standpoint, is conducting *personally* and *individually* a business different from that of the general manager of any other kind of an establishment who is employed on a weekly salary. The business of the employers may and does vary as widely as the different channels of trade and commerce are divergent. The *personal* and *individual* business of these general managers remains the same. The fact that one manages a packing-house, another a shoe-house, another a dry-goods house, another a publishing-house, is a mere incident to their common type of business, viz.: managers or *alter egos* of their respective principals, each employed on weekly salaries and each discharging his particular duties to his particular employer. To illustrate, suppose the act had specified traveling salesmen of packing-houses instead of managing agents. Can it be said that the traveling salesmen of a packing-house on a weekly salary basis,

considered *personally* and *individually,* is engaged in a business different from that of a traveling salesman employed on like terms for any other kind of an establishment? They are each and all traveling salesmen employed on like terms, and each and all, *personally* and *individually,* engaged in the same business. Take day laborers, for instance; they are employed, more or less, in many different kinds of industry. The only business of any one of them is to do his day's work, at the place and in the manner required, and draw his pay. One may sow and one may reap, for

"Men must work and women must weep."

This Act arbitrarily and unreasonably selects this class of persons who are employed by packing-houses under these particular names, and places these burdens upon them, while citizens of the United States, holding similar positions, with equally high sounding titles, are permitted to pursue their like lawful callings, as guaranteed to them by the Constitution of the United States, without let or hindrance.

(d) The act is construed to impose a tax on the occupation of agents of packing-houses whether the business they have in charge is wholly interstate or wholly domestic.

"It is unconstitutional only to the *extent* that it *seeks* to tax interstate commerce. To that extent it is invalid." Record, p. 49.

Our Court has by its construction of the act held that it was the intention of the Legislature to pass an act that would levy a license or occupation tax for the same amount on any agent, the *alter ego* of the principal, who was carrying on the business of a packing-house, whether the business of the principal so carried on by the agent was wholly interstate or wholly domestic. If the one principal did only domestic business, the *alter ego* of that business was subject to the tax. If the other principal did only interstate business, the *alter ego* of his business would not be subject to the tax. The act is silent as to any distinction between the tax on the agent of the principal doing a domestic business and the agent of the

principal doing interstate business. The Supreme Court holds the act covers both. The Legislature never undertook to classify agents for the conduct of domestic business as a separate class from agents for the conduct of interstate business. Each would be an agent of a packing-house. Each would be in the same class. Each would have the same occupation, viz.: that of being agent for a packing-house. One must pay the tax—the other must not.

Thus analyzing the construction of the act by the Supreme Court of Georgia, it is plainly violative of the fourteenth amendment.

This fourteenth amendment to the Constitution has been considered in several decisions of the Supreme Court. In the case of *ex parte* Virginia, 100 U. S. 339, that court said of that amendment:

"It suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others."

Again, in considering it, the Supreme Court, in the case of Barbier *vs.* Connally, 113 U. S. 27, 31, said:

"That no impediment shall be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

In the case of Yick Wo *vs.* Hopkins, 118 U. S. 356, the Supreme Court, affirming the rule expressed in the foregoing decisions, said:

"The fourteenth amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race or color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws."

In Gulf, etc., Ry. *vs.* Ellis, 165 U. S. 151, 168, it is held that the fourteenth amendment prohibits a statutory classification which is

based on arbitrary selection. On page 159, Mr. Justice Brewer says:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughful consideration than these words of Mr. Justice Matthews, speaking for this court, in Yick Wo *vs.* Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all the cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

The doctrine of this case now sought to be applied is in no manner modified, but fully reaffirmed, in Railroad *vs.* Matthews, 174 U. S. 96, notwithstanding a Kansas statute imposing attorneys fees was there upheld, while the Texas statute imposing attorneys' fees was, in the Ellis case, declared unconstitutional. The Kansas statute was upheld because it involved a police regulation, while the Texas statute merely imposes a penalty. There is no pretense that the act

in the case at bar is anything more than a revenue law. Its caption so declares it, and the Court below so treats is. (See Linton *vs.* Childs, 105 Ga. 567, 573, and citations.) See also:

In re Yot Sang, 75 Fed. Rep. 984.
Fraser *vs.* McConway, 82 Fed. Rep. 257, 259.
Randolph *vs.* Builders & Painters Supply Co. 106 Ala. 501.
New York Life Insurance Co. *vs.* Smith (Texas), 41 S. W. Rep. 680.
St. Louis, etc., Ry. *vs.* Williams, 49 Arkansas, 492.
Denver, etc., Ry. *vs.* Outcalt, 2 Colo. App. 395.
Atchison, etc., Ry. *vs.* Baty, 6 Nebraska, 37.
O'Connell *vs.* Lumber Co. (Mich.), 71 N. W. Rep. 449.
Jacksonville *vs.* Carpenter, 77 Wisconsin, 288.
State *vs.* Dering, 94 Wisconsin, 588.
Pearson *vs.* Portland, 69 Maine, 278.
Burrows *vs.* Brooks (Mich.), 71 N. W. Rep. 460.
Middleton *vs.* Middleton, 54 N. J. Eq. 692.
State *vs.* Goodwill, 33 W. Va. 179.
Kuhn *vs.* Common Council, 70 Michigan, 538.
State *vs.* Hinman, 65 N. H. 105.
State *vs.* Penwyer, 65 N. H. 116.

II.

THE ACT IS A BURDEN UPON AND A REGULATION OF INTERSTATE COMMERCE.

This brief need not be extended by citing authorities to the proposition that a tax on the privilege of doing a business is in effect a tax on the business itself, for this is admitted in the decision under review. Record, p. 46 (91).

Nor is it necessary to cite authorities to the proposition that when the managing agent took orders in Georgia to be filled in Chicago and afterwards received the goods and broke the bulk of the car and distributed the goods to the customers from whom he obtained such orders and collected the purchase price, all in Georgia, he was engaged in interstate commerce. This proposition is admitted by the learned Chief Justice below, following Caldwell *vs.* North Carolina, 187 U. S. 622. See Record, p. 47 (92).

The declaration as amended shows that the business, upon which this tax, in effect, is a burden, is for the most part interstate business. That portion of it which may be termed intrastate or domestic business is incidental to the main object in view. It is shown to be necessary to transport and keep fresh meats in cold storage. "In most cases said goods are sold at or before the day of their shipment and, when received in Atlanta, delivered in the original packages to the purchasers of said goods.' Record, p. 8 (15). The demurrer admits the truth of this allegation and the Supreme Court of Georgia expressly holds that such dealing constitutes interstate commerce. Record, p. 44 (3d headnote).

The only additional business done is to preserve in coolers and dispose of in regular course of business "the rest of said goods so shipped to Atlanta."

Plaintiff in error is the managing agent for the entire business of Nelson Morris & Company at Atlanta, and under this act, as con-

strued, is the instrumentality through which Nelson Morris & Company's business is affected. There is but one business, one managing agent, and one tax. Nothing written or read into the act draws any distinction between that part of the business which is interstate and that which is domestic. The act makes no reference at all to the business of the packing-house, except as descriptive of the class of persons taxed. Nothing in the record justifies the learned Chief Justice in saying that "petitioner, as managing agent, is conducting two kinds of business."

The general rule laid down by this Court under which tax acts are held void, as burdens upon or regulations of interstate commerce, are so familiar that extended citations are deemed unnecessary.

In *Crutcher vs. Kentucky*, 141 U. S., 47, the act declared unconstitutional provided "that it shall not be lawful, after the 1st day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth (Ky.), to set up, establish or carry on the business of transportation in this State, without first obtaining a license from the Auditor of Public Accounts to carry on such business." This was not primarily a revenue act, because it required certain financial strength to be shown as a condition to grant of license; and the chief argument in its support rested on the contention that it was the legitimate exercise of the police power of the State. The act was held to be invalid because it prohibited the agent from carrying on the business of his principal, without first obtaining a license, and this was a regulation of interstate commerce, inasmuch as the "largest portion" of the business of the company he represented was interstate commerce. In the opinion Mr. Justice Bradley says: "As a summation of the whole matter it was aptly said by the present Chief Justice in Lyng *vs.* Michigan, 135 U. S., 161, 166: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects

f that commerce, or on the receipts derived from that transporta-ion, *or on the occupation or business of carrying it on,* for the rea-on that taxation is a burden on that commerce, and amounts to a egulation of it, which belongs solely to Congress.'

"We do not think that the difficulty is at all obviated by the fact hat the express company, as incidental to its main business (which s to carry goods between different States), does also some local usiness by carrying goods from one point to another in the State f Kentucky. This is, probably, quite as much for the accommoda-ion of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the egulations as to license and capital stock are imposed as conditions n the company's carrying on the business of interstate commerce, vhich was manifestly the principal object of its organization. These egulations are clearly a burden and a restriction upon that com-nerce. But whether intended as such or not they operate as such."

In *Osborn vs. Florida,* 164 U. S., 650, the act under considera-on imposed the special tax *directly upon the express company* and nflicted the penalties for failure to procure licenses not only upon ne company itself, but upon any person knowingly acting as its gent before *it* paid the tax. The Supreme Court of Florida con-trued the act to apply only to the local business of the company one within the State of Florida, saying that there was nothing in ne act that "should or can properly be construed to apply to inter-tate or foreign commerce." With this language before him, Mr. ustice Peckham says:

"The Supreme Court of Florida has construed the ninth section f this act and has held in express terms that it does not *apply* to or *ffect* in any manner the business of this company, which is inter-tate in its character; that it *applies* to and affects only its business vhich is done within the State, or is, as it is termed, 'local' in its haracter, and it has held that under that statute so long as the ex-ress company confines its operations to express business that con-

sists of interstate or foreign commerce, it is wholly exempt from the legislation in question."

This construction not being open to review by the Supreme Court of the United States, it followed as a matter of course that the act was held not to violate the commerce clause of the Federal Constitution. But for this construction by the State Court, the result would have been different.

"It may be here assumed that if the *statute* applied to the express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce." Idem, pp. 653, 654.

The case at bar falls within the doctrine of the *Crutcher* case and is distinguished from the *Osborn* case because

(a) The act as construed by the Supreme Court of Georgia, applies to the agent and solely to the managing agent or *alter ego* of the principal, and not directly to the principal. The entire business of the employer is in effect taxed through the single medium of such manager.

(b) By the terms of the act this particular agent is required to register or take out a license and pay the tax *before* he can do any business for his principal, either domestic or interstate.

(c) His duties for the most part, related to the conduct of the interstate business of his principal.

(d) The Florida Court in the *Osborn* case did not hold that the act then under review was unconstitutional to the extent that it affected interstate commerce. On the contrary that act was declared to be wholly constitutional because it did not, and was not intended to, apply to or affect in any manner interstate commerce. "The act involved in the present case imposes a tax on the agents of packing-houses which do business in the State. It is unconstitutional only to the extent that it seeks to tax interstate commerce. To that extent it is invalid." (Quotation from second opinion. Record, p. 49 (96).)

It thus appears that the statute herein falls within "the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void." *Osborn* case, supra, page 655.

It is certain that Nelson Morris & Company, residents of Chicago, can not conduct their business in Georgia, most of which is admitted to be interstate business, without the instrumentality of a managing agent, or *"alter ego;"* upon this instrumentality the tax is imposed; if lawful it may easily be made prohibitory.

In *Pullman Palace Car Company vs. Pennsylvania*, 141 U. S. 18, a distinction is very clearly drawn between those cases upholding a tax as not regulating interstate commerce, where it is imposed merely on the property employed in the business, from the cases where the tax is laid upon the right to do business at all. In the latter class of cases such taxes are held to impose a direct burden on the commerce itself, and of course the regulations as to procurement of license, etc., amount to regulations of such commerce. In the majority opinion the court say:

"Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State can not be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. Moran *vs.* New Orleans, 112 U. S. 69, 74; Pickard *vs.* Pullman's Southern Car Co., 117 U. S. 34, 43; Robbins *vs.* Shelby Taxing District, 120 U. S. 489, 497; Leloup *vs.* Mobile,

127 U. S. 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. Fargo *vs.* Michigan, 121 U. S. 230; Philadelphia & Southern Steamship Co. *vs.* Pennsylvania, 122 U. S. 326.

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property; Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S. 196, 209; Western Union Telegraph Company *vs.* Attorney-General of Massachusetts, 125 U. S. 530, 552. This is not only admitted, but insisted on, by the plaintiff in error."

In *Pullman Company* vs. *Adams,* 189 U. S. 420, *Crutcher* vs. *Kentucky* is distinguished and *Osborn* vs. *Florida* is followed in upholding an Act of Mississippi levying a privilege tax on sleeping-car companies:

"On each sleeping and palace car company carrying passengers from one point to another within the State, one hundred dollars, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars." We assume that the last words mean what afterwards was expressed by an amendment, "over which the company runs its cars in this State."

In deciding the case Mr. Justice Holmes says:

"The Pullman Company is an Illinois corporation. Its sleeping-cars were carried by various railroad companies, and all of them were carried into the State from another State, or out of the State to another State, or both. But such cars in their passage also carried passengers from point to point within the State, and a specific

fare was collected by the servants of the Pullman Company. The company attempted by pleas and by an offer of evidence to bring before the Court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its commerce between the States, while at the same time, it argued, it was compelled to assume that burden by Sec. 195 of the State Constitution, which declares sleeping-car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned section 3387 unconstitutional are the errors assigned.

"If the clause of the State Constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it would seem to be true that the State Constitution and the statute combined would impose a burden on commerce between the States analogous to that which was held bad in Crutcher *vs.* Kentucky, 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the State, the case is governed by Osborn *vs.* Florida, 164 U. S. 650. The company can not complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

"As the validity of the tax is thus bound up with the effect of the section of the State Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing

with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the Constitution or the tax act, is invalid. But we assume that the opinion of the supreme Court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the Supreme Court was correct for the reason sufficiently stated above."

Now it is very clear that if the Pullman Company had been required to take all passengers offering themselves for transportation between points wholly within the boundaries of Mississippi; if its choice as to the kind of business it would transact in that State was removed by the mandatory requirements of the State Constitution; and if it established its contention that its business within the State was merely a burden on its commerce between the States,—certainly the privilege tax act above quoted would have been declared invalid.

We respectfully submit that nothing in this case militates against our contentions in the case at bar. If the tax under discussion was levied directly upon all packing-houses doing business in Georgia, and all such packing-houses were required to take out licenses, the question would be very different. Such a law would be so distasteful to Georgia packing-houses that it would probably never be passed by the Legislature. Instead of levying the tax on all packing-houses doing business in Georgia, the act is so framed that it affects only those packing-houses who are under the necessity of doing their business in Georgia through an *"alter ego"* or managing agent, and through such medium the whole of their business

in this State is affected by requiring this managing agent to register and pay the tax. The effect on the whole of such business is not mollified by holding that the act is void in so far as it seeks to tax interstate commerce, as will be hereafter more fully discussed.

Allen vs. *Pullman Company*, 191 U. S. 172, 183, is the latest case pertinent to the case at bar.

In this case two kinds of legislation were under consideration, viz.: First—An act applying to all the business sought to be taxed, and under its terms requiring payment for the privilege of conducting such business (the running of Pullman cars) regardless of the fact whether it was interstate or domestic. Second—A series of tax acts the terms of which apply strictly to business done wholly within the State.

The first Act is held to regulate interstate commerce and to be therefore void, and the latter acts are held to be constitutional, it not appearing that compliance with their terms was compulsory before any business of any character could be done within the State.

The first act above referred to levied a privilege tax upon the running of sleeping-cars, requiring each company doing business in the State of Tennessee to pay $500. per annum on each car, for the privilege of operation whether it made a business of it or not. This court held the Act of 1887 to be void under the ruling in Pickard *vs.* Pullman Company, 117 U. S. 34, because it was substantially the same as the Act of 1877 which was declared to be void in the Pickard case. Mr. Justice Day uses the following language:

"Under the earlier act the tax is required for the privilege of running and using sleeping-cars on railroads, not owning the cars. In the latter act it is exacted for the privilege of doing business in the State. This business consists of running sleeping cars upon railroads not owning the cars and is precisely the privilege to be paid for under the first act, neither more nor less. In neither act is any distinction attempted between local or through cars or carriers of passengers. The railroads upon which the cars are run are

lines traversing the State, but not confined to its limits. The cars of the Pullman Company run into and beyond the State as well as between points within the State. The act in its terms applies to cars running through the State as well as those whose operation is wholly intrastate. It applies to all alike, and requires payment for the privilege of running the cars of the company regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State."

The opinion goes on to say that:

"There is no decision of the Supreme Court of Tennessee limiting the act in its operation to intrastate traffic. It is true that the Comptroller has sought to restrain the operation of the law by imposing the tax for two years upon cars running between Nashville and Memphis and between Nashville and Chattanooga for two years, and fixing one car in each year as the proportion of local business done on interstate cars for two years. But this action does not conclude the State in taxing for other years, and the action taken by the Comptroller does not limit the terms of the law affecting interstate commerce."

So in the case at bar there is no decision of the Supreme Court limiting the Georgia act in its operation to intrastate business. On the contrary, the decisions under review hold that the act operates so as to affect both the domestic and interstate business of Nelson Morris & Company, and to the extent that interstate business is affected the act is declared to be void. But the act does not operate directly on the business of Nelson Morris & Company. Their business is affected solely through the medium of their general manager. The effect thus produced is single and not divisible, because the medium through which it operates is single and not divisible. The effect of hydrogen is to stifle combustion, while oxygen excites it. It would be as easy to divide a stream of water played on a fire so as to eliminate the effect of the oxygen and confine it to the hydrogen it contains, as to divide the act under review so as to

annul that part of it which affects interstate commerce, and confine it to the domestic business upon which it bears. As the elements of the water form the single stream which, through the hose pipe, extinguishes the fire, so the elements of the act form the single law which, through the agent, affects the business of his employer. The chemist can reduce the water to its elements and then eliminate one of them, but he can not annul the effect of one of them while still in combination with the other.

So the Supreme Court of a state, by a sort of intellectual alchemy, can analyze an act of the Legislature and so construe it as to eliminate from it the appearance of an obnoxious element.

By a sort of legal fiction (a process unknown to chemistry), the hydrogen is found never to have been an element in the compound at all, however strong the odor of it may be, and the Supreme Court of the United States must treat the subject accordingly, despite the evidence of its own olfactories. In other words, if a legislative act was the equivalent of water, the Supreme Court of the State in which it was enacted could declare that it was not water at all, but pure oxygen or pure hydrogen, as the case may be. And the Supreme Court of the United States could not take issue on the subject, but would have to declare that the effect of the act was solely that of oxygen or hydrogen, as the case may be. But if the State Supreme Court concedes that the act was water, and undertakes to annul one of the elements of the fluid, while yet in combination, by declaring that with both elements in it, it shall, in application, have the effect of but one, this Court would not be bound by such a judgment.

Under the inflexible law of chemistry oxygen and hydrogen combine to form water. The effect of water on fire, under another inflexible law, is uniform, while the effects produced by its constituent elements on the same fire, when applied separately, are diametrically opposite. If, however, but one conduit is available, the elements passing through it, in combination, can have but the one ef-

fect, viz.: to extinguish the fire. The obnoxious hydrogen in the present act which has the effect to regulate, and mayhap extinguish, interstate commerce can not be avoided in passing through the single available medium of managing agent in combination with the revenue producing oxygen of a tax on the privilege of carrying on a domestic business, and thus have its effect annulled. The inexorable effect of the two elements thus applied, if sufficient quantity is used, will be to put out the fire—stifle the business—altogether, both state and interstate.

We assume, therefore, that when this learned court in the *Allen* case, supra, comments on the absence of a decision of the Supreme Court of Tennessee limiting the Act of 1887 "*in its operation* to intrastate business," it meant that there was no decision so construing the act as to limit it, in its operation, to intrastate business. This court has always held that, regardless of the phraseology of a law of a state, if its necessary effect and operation is to violate the Federal Constitution it will be declared void.

The act under discussion by its terms requires compliance with its regulations, and payment of the tax it imposes, for a full fiscal year as a condition precedent to exercising the privilege of the occupation described. The occupation described is construed to be that of managing, or "*alter ego*" agent of a packing-house, regardless of whether such packing-house is within or without the State, or whether its business is interstate or local.

It was the purpose of the act to tax only one such agent. There could not be two agents, one in charge of the domestic and the other in charge of the interstate business, because neither would then be "the managing or head agent in charge of the entire business." Neither would be an *alter ego* in charge of *the* business, treating it as a whole.

Hence under the purpose of the act to tax only one agent, and that the managing or head agent, in charge of the entire business, if any of the business was interstate business that part of the busi-

ness is taxed as surely as any other part of the business is taxed; if all of the business is thus regulated by requiring this particular agent to register, etc., that part of it which is interstate is as certainly regulated by the act as that the whole includes all of its parts.

Therefore, the Act under review falls within the doctrine of the *Allen* case and *Crutcher* case holding the several acts, therein considered, to be void as unconstitutional regulations of interstate commerce.

Leloup vs. *Mobile*, 127 U. S. 640, 647, is cited as an authority to support the *Allen* case. Its doctrine is clearly to the effect that where a tax affects the whole business without discrimination, it is void, notwithstanding a portion of the business affected is domestic. It is most respectfully insisted that the learned Chief Justice of Georgia misconceived the import of the decision in the Leloup case. In the fifth division of the opinion (Record, pp. 48 and 49), it is argued that the Leloup case is inapplicable because it involves the rights of a telegraph company under the Act of Congress of 1866. In deciding the *Allen* case, Mr. Justice Day quotes from the opinion of Mr. Justice Bradley in the *Leloup* case as follows:

"But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subject to taxation, without the imposition of a tax which covers the entire operations of the company."

This quotation demonstrates that the Act of 1866 did not in any manner influence the decision. The true doctrine of the Leloup case has been reaffirmed consistently by this court down to the Allen case in the 191st.

See Asher *vs.* Texas, 128 U. S. 129.

Western Union Tel. Co. *vs.* Alabama, 132 U. S. 477.

Lyng *vs.* Michigan, 135 U. S. 166.
McCall *vs.* California, 136 U. S. 110.
Crutcher *vs.* Kentucky, 141 U. S. 58.
Pollock *vs.* Farmers' Trust Co., 157 U. S. 582.
Adams Express Co. *vs.* Ohio, 165 U. S. 234.
Stockard *vs.* Morgan, 185 U. S. 34.
Atlantic Company *vs.* Philadelphia, 190 U. S. 162.
Allen *vs.* Pullman Co., 191 U. S. 179.

The *Leloup* case is in no manner modified, and the opinion under review is to no extent supported, by Postal Telegraph Cable Co. *vs.* Charleston, 153 U. S. 692.

The distinction lies in the language of the legislation attacked. The ordinance there complained of, by its express terms, limited its operation to "business done exclusively within the city of Charleston."

So in *Western Union Telegraph Company vs. Alabama,* 132 U. S. 472, the tax contested was imposed, by the express letter of the law, exclusively upon the business done by the company in the State of Alabama.

Ratterman vs. *Western Union Telegraph Company,* 127 U. S. 411, was decided on the same date as the *Leloup* case. Both decisions were unanimous. It is hardly to be supposed there was any conflict between them in the minds of this court at the time they were decided. There is no conflict between them in fact or in principle. The Ratterman case appears to have been really a *moot* case. The question certified by the circuit judges, on difference of opinion, was robbed of its pith and point by the agreed facts. The whole extent of the decision is that inasmuch as the receipts from interstate business were separable from the domestic business, the tax complained of would not be declared wholly void, but only to the extent that it was imposed on the receipts from interstate business. It being a tax on receipts, and the source of the receipts being ascertainable (indeed, under the agreed statement of facts, already ascer-

tained), its enforcement could be easily confined within constitutional limits.

How different is the case at bar? Here the single medium through which the tax is imposed upon the business is the "*alter ego*" of the non-resident principle. Under pain of fine and imprisonment the person who proposes to occupy the position must register and pay a fixed license tax for the whole year before he can transact any business of his principal. The act itself makes no distinction whatever between interstate and domestic business. The peculiarity of the medium through which the tax is imposed would indicate an intention to tax interstate business rather than domestic. A domestic packing-house would have no need for an *alter ego*. The proprietor would be his own *ego*, if the expression is permissible. It is entirely legitimate to argue that the purpose underlying the phraseology of the act was indirectly to reach non-resident packers who necessarily did business through agents, while local houses escaped.

This is in large measure borne out by the history of similar legislation in this State seeking to tax Western packing-houses, of which this court will take judicial cognizance. The general Tax Act of the State in 1890 prescribed a license tax "upon all packing-houses doing a cold-storage business in this State, whether carried on by the owner thereof, or by their agents, $500 in each county where said business is carried on." Acts of 1890-1891, volume 1, p. 39.

In *Stewart* vs. *Atlanta Beef Company, Armour Packing Company*, and *Nelson Morris & Co.*, 93 Georgia 12, it was held that a packing-house which used cold storage for preserving its own commodities alone, and did not receive and store for the public, or any part thereof, was not doing a cold-storage business within the meaning of the act, and therefore was not subject to the tax. Thus the act for all practicable purposes was defeated. This decision was rendered October 30, 1893. Pending the decision, the Legislature re-enacted this clause *in hæc verba* in the biennial Tax Act

of 1892. See Acts of 1892, p. 26. In the light of this decision the Act passed in 1894 contained this provision:

"Nineteenth. Upon all packing-houses or dealers doing business in this State, whether carried on by the owners thereof or by their agents, fifty dollars ($50) in each county where said business is carried on." See Acts of 1894, page 22.

As this was a straight business license and applied to all alike, and the amount was reasonable, no attack on it appears in the Georgia cases. In 1896 this clause was re-enacted, except that the amount was raised to $100. See Acts 1896, p. 25. Still no attack. The amount of the tax may be presumed to have rested uncomfortably on local houses. Be that as it may, in 1898 the law was changed to read: "Upon all agents of packing-houses doing business in this State, $100 in each county where said business is carried on." See Acts of 1898, p. 25. It will be observed that this is the exact language of the act now under consideration save only that the amount is $100 instead of $200. The amount being moderate still no attack. In 1900 the act was passed making the amount $200 and was attacked in the present suit. As local houses could operate *in propria personæ* without the necessity of an *alter ego*, it may be inferred that no protest was made when the amount was doubled. If it is constitutional in form the amount can be indefinitely increased, and the local packers will monopolize the field. Could any case afford a finer illustration of the wisdom of the law which reposes power in Congress exclusively to regulate interstate commerce?

We are not unmindful of the brokers' license tax cases of which

Ficklen *vs.* Shelby County, 145 U. S. 1,

may be considered the leading case. A person doing business as a general merchandise broker has the choice of representing interstate or domestic dealers, either or both. It may well be said of such an one, in the language of Mr. Chief Justice Simmons, "if he would escape the tax, let him avoid the business which is subject to the tax and confine himself to that which is not. If he would

continue to pursue the taxed business, let him pay the tax which is imposed on all who are engaged therein. He can not engage in that business, and, by engaging also in another and non-taxable business, create an exemption for himself, and thus outstrip those of his competitors who still follow the taxed business only." Record, p. 50 (98).

Such language applied to plaintiff in error in the position the record shows him to have occupied, and engaged in the "anomalous business" attributed to him, produces mere confusion. It fails to keep in view the meaning of the act as construed by the court. If it is possible to select mere employees of persons engaged in interstate commerce and thus indirectly tax and regulate the business of the employers, the benefits of the commerce clause could be easily destroyed. Apply the doctrine to railroads, which are the most conspicuous examples of corporations engaged in both interstate and domestic commerce. By selecting the *"alter ego"* of the company in each county, and requiring him to register and pay an occupation tax in any amount the Legislature saw fit to impose as a condition to the discharge of his duties, the heaviest burdens could be placed on the interstate business of the company. If it should protest it would be informed that to escape the tax its *"alter ego"* must confine his operations exclusively to the interstate business of the company. But the company needs an *"alter ego"* for all of its business, and the law as construed reaches only the *"alter ego."* The act makes no provision for an *"alter ego"* for domestic business alone. If it were otherwise and possible, the company would have one *"alter ego"* for its domestic business and another one for its interstate business; the one subject, and the other not. The law would thus be obnoxious either to the 14th amendment or to the commerce clause. We think it is obnoxious to both, and submit, with the utmost respect, that the reasoning of the learned Chief Justice is *non sequitur* when he holds that the Act is unconstitu-

tional so far as it effects interstate business. If it is unconstitutional at all it is wholly void.

We may concede that this court is bound by the construction put upon the act in the first decision complained of, but insist that as thus construed the effect of the law renders it wholly obnoxious to the Constitution of the United States.

Respectfully submitted,

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